PUBLIC PROSECUTOR

v.

SELVARAJAH RAMAN M. MAYANDI

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CRIMINAL APPEAL NO. 13 & 14/82]
10 NOVEMBER 1983

CRIMINAL LAW AND PROCEDURE: *Sentence - Appeal against - Cross appeal for inadequacy - Conviction for carnal knowledge - Contradictory evidence - Corroboration - Meaning of.*

The respondent was convicted for the offence of carnal knowledge with a female person under the age of 16 years, punishable under s. 16(1) of the Women and Girls Protection Act 1973. He was sentenced to 18 months' imprisonment.

He appealed against conviction and sentence, whilst the Public Prosecutor appealed against the sentence on the grounds of inadequacy.

The defence showed that there were various contradictions in the complainant's evidence in Court and her report. It was contended that the accused was not examined to see if he was capable of erection and therefore there was no evidence to prove that he was capable of committing the alleged offence. Further the expression "carnal knowledge" is not defined in the said Act.

As for the prosecution, there was the oral testimony of the complainant of her association with the accused, several letters written by the complainant to the accused supporting her identification of the accused and the medical evidence to corroborate the complainant's evidence of the *factum* of carnal knowledge.

Held:

[1] There were no grounds for interfering with the conviction of the accused by the lower Court. Therefore the appeal against conviction was dismissed.

[2] As regards the accused's appeal against sentence, the facts that the complainant was a consenting party and the accused was a first offender were considered, and the sentence was reduced to nine months.

[3] Public Prosecutor's appeal against sentence was therefore dismissed.

[Appeals against conviction and inadequacy of sentence dismissed. Sentence reduced to nine months.]

Cases referred to:
R. v. Marsden [1891] 2 QB 149
Din v. Public Prosecutor [1964] 30 MLJ 300
Director of Public Prosecution v. Kilbourne [1973] AC 729
R. v. Beale [1865] LR 1 CCR 10

Other sources referred to:
Shorter Oxford English Dictionary
Stroud's Judicial Dictionary
Halsloury's Laws of England (4th Edn.) Vol II, Para. 454

For the accused - Bala Mahesan; M/s. Bala Mahesan & Co.
For the public prosecutor - Mohd. Nordin bin Haji Sulaiman; DPP

JUDGMENT

Gunn Chit Tuan J:

Selvarajah s/o Raman M. Mayandi ("the accused") was convicted of the offence of carnal knowledge with a female person under the age of 16 years except by way of marriage under paragraph (i) of sub-section (1) of s. 16 of the Women and Girls Protection Act 1973, and was sentenced to 18 months imprisonment. He appealed against conviction and sentence whilst the Public Prosecutor being dissatisfied with the sentence has also appealed against it on the grounds of inadequacy and the failure of the learned Magistrate to consider "the element of public policy in passing sentence". The charge against the accused was as follows:-

> That you on 23 February 1981, at about 3.20 p.m. in the store of block C, Rifle Range Flats, in the District of Georgetown in the State of Penang did have carnal knowledge with a female person under the age of 16 years, to wit, LIM SWEE SIM (F), except by way of marriage and that you have thereby committed an offence punishable under s. 16 (1) of the Women and Girls Protection Act 106/73.

According to Lim Swee Sim (the complainant) she was born on 2 February 1966 and was therefore just over 15 years old at the time of the alleged offence. She was about 16 years 2 months old when she was affirmed and gave evidence in Court and said that she came to know the accused in January 1981 when he was working as a sweeper at the Rifle Range Flats where she lived with her father, brothers and sisters. She and the accused became friends and on 23 February 1981 at about 3.30 p.m. she met the accused who invited her to go into a storeroom in Block C of the said Flats. After some conversation the accused pulled her into a wall recess and started to "romance" with her and then "inserted his penis into her private part. There was penetration. She felt pain. He penetrated into her private part for about three minutes". The rest of her evidence concerned events such as her visits to the accused's home which took place after the date of the offence alleged in the above charge. The complainant was subjected to severe cross-examination by the defence and admitted that a portion of her first information report (Exhibit P6) made by her on 4 June 1981 was not true. The defence managed to show that there were various contradictions in her evidence in Court compared to what she had stated in her report and Counsel contended that she was therefore lying with regard to various matters. However the learned Magistrate who had the benefit of seeing the complainant give her evidence found her to be a truthful witness after two lengthy sessions of cross-examination.

Counsel for the accused also pointed out that the expression 'carnal knowledge' is not defined in the said Act. According to the *Shorter Oxford English Dictionary* it means sexual intimacy and in *Stroud's Judicial Dictionary* it is stated that "in the crime of RAPE, 'carnal knowledge' means the penetration to any slightest degree of the organ alleged to have been carnally known by the male organ of generation" (Steph. Cr., 9th Edn., p. 262; s. 63 Offences Against the Person Act 1861 (c. 100)." In case of carnal knowledge of girls under sixteen, it is therefore sufficient for the prosecution to prove penetration, the crime being complete without emission. (See *R. v. Marsden* [1891] 2 QB 149. In this case it was contended by defence Counsel that one Dr. Abdul Aziz (PW3) who examined the accused had admitted that he did not test him to see if he was capable of erection and that there was therefore no evidence to prove that the accused was capable of committing the alleged offence. However in this case as there was the evidence of Dr. Kanagalingam (PW3A), the Consultant Gynaecologist, General Hospital, Penang that he had also examined the complainant's genitals

and found that there were old healed lacerations which had been caused in normal previous sexual intercourse, that was sufficient proof of penetration of the complainant's sexual organ by some male organ of generation.

On corroboration both the learned Counsel for defence and the Deputy Public Prosecutor cited various Malaysian and English cases to which I do not, with respect, propose to refer to except the Federal Court case of *Din v. Public Prosecutor* [1964] 30 MLJ 300 in which case Thomoson LP (as he then was) delivered the oral judgment of the Court and held that:-

> The desirability for corroboration of the evidence of the prosecrutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law and which is still a rule of practice and prudence) springs not from the nature of the witness but from the nature of the offence. The necessity for corroboration, generally speaking, is not so imperative with regard to the identity of her assailant as to the fact of the offence itself. Though it might be dangerous to find the *factum* of rape on the uncorroborated evidence of the prosecrutrix, once that *factum* of rape is established there seems to be nothing left to support the view that her identification of the assailant calls for corroboration any more than it would in relation to any other type of offence.

In this case there was the evidence of the Consultant Gynaecologist to corroborate the evidence of the complainant regarding the *factum* of carnal knowledge although it was not corroboration of that part of her evidence in which she had put the blame on the accused. It was also the contention of learned Counsel for the accused that there was no evidence of opportunity and disposition in this case.

The word "corroboration" is not a technical term of art; it means by itself no more than evidence tending to confirm, support or strengthen other evidence *(Director of Public Prosecution v. Kilbourne* [1973] AC 729 at 758). Reference may be made to the following passage in para. 454 of Vol. II of *Halsbury's Laws of England* (4th Edn.) which I would respectfully adopt:

> The corroboration need not consist of direct evidence that the defendant committed the offence, nor need it amount to confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge under consideration. It is sufficient if it is circumstantial evidence of the defendant's connection with the offence; but it must be independent evidence, and must not be vague.

In this case there was not only the oral testimony of the complainant of her association with the accused from January 1981 until June that year including her visits to the accused's home but there were also several letters written by the complainant to the accused (Exhibits D7, P13A to E) which were received by the police investigation officer (PW5) from the accused's mother and were produced in Court as evidence by the prosecution without any objections by the defence and show that the accused had a close and intimate relationship with the complainant during that year. Therefore there was not only medical evidence to corroborate the complainant's evidence of the *factum* of carnal knowledge but also documentary evidence to support her identification of the accused. To use the words of Thomson LP again in *Din's* case:-

> it is a case of which story is to be preferred and it seems to follow from this that corroboration of any part of the prosecrutix's story is *pro tanto* of some value.

As the accused has not been able to satisfy me that there are grounds for interfering with his conviction by the lower Court, I therefore dismissed his appeal against conviction. As regards the accused's appeal against sentence, I considered that the complainant was a consenting party, although her consent was immaterial (See *R. v. Beale* [1865] LR 1 CCR 10).

Nevertheless the accused was a first offender and in all the circumstances of the case I considered that justice would be served if I reduced the sentence to nine months. The Public Prosecutor's appeal against sentence was therefore dismissed.

Also found at [1984] 1 CLJ 268